Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-7271

BETTE P. JABLON and JACOB C. JABLON,

Appellants,

—v.—

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement of the Case	3
The Question is Substantial	4
CONCLUSION	15
APPENDIX:	
Order	1a
Opinion	2a
Defendant's Notice of Appeal	49a
Plaintiffs' Notice of Appeal	51a
Statute Involved	53a

TABLE OF AUTHORITIES

PAGE

Cases:

Aberdeen & Rockfish R.R. Co. v. S.C.R.A.P., 95 S. Ct. 2336 (1975)_____ 13

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902)_____ 8

Bell v. Hood, 327 U.S. 678 (1946)____ 11

Bivens v. Six Unknown Federal Narcotics Agents, 409 F.2d 718 (2d Cir. 1969), 403 U.S. 388 (1971)_____11, 12

Communication Workers of America v. American Telephone and Telegraph Co., 513 F.2d 1024 (2d Cir. 1975)_____ 9

Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972)_____ 9

Doe v. Bolton, 410 U.S. 179 (1973)___ 2

Flemming v. Nestor, 363 U.S. 603 (1960)_____12, 13

Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973)_____ 13

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960)_____ 8

PAGE

Porter v. Warner Holding Co., 328 U.S. 395 (1946)_____ 7, 8

Powell v. Richardson, 355 F. Supp. 359 (E.D. Pa. 1973)_____ 5

Roe v. Wade, 410 U.S. 113 (1973)_____ 2

Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942)_____ 9

Weinberger v. Salfi, 95 S. Ct. 2457 (1975)_____4, 6, 7, 10

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)_____6, 7, 9, 14

Constitutional Provisions:

United States Constitution Fifth Amendment_____ 4

Federal Statutes:

28 U.S.C. §1253_____ 2

28 U.S.C. §2282_____ 2

28 U.S.C. §2284_____ 2

42 U.S.C. §402_____ 2, 4

42 U.S.C. §402(b)_____ 3

42 U.S.C. §402(c)_____ 3

42 U.S.C. §402(g)_____ 7

42 U.S.C. §405(g)_____2, 5, 6, 7, 10, 12

PAGE

Other Authorities:

Cound, Friendenthal & Miller,
Civil Procedure 17 (1974)_____ 5

IN THE
SUPREME COURT OF THE UNITED STATES
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BETTE P. JABLON and JACOB C. JABLON,

Appellants,

-v.-

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellee.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Maryland, entered on July 28, 1975, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the District of Maryland

is reported at 399 F. Supp. 118. It is set out in the Appendix, infra, pp. 2a-48a.

Jurisdiction

This action to declare unconstitutional and to restrain the enforcement of Title 42 U.S.C. §402, insofar as it requires different treatment for male as opposed to female spouses of individuals insured under Social Security, originated through a complaint filed by appellants in the United States District Court for the District of Maryland, on July 12, 1974. Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court was convened to hear and determine the action. On July 28, 1975, the United States District Court for the District of Maryland, sitting as a three-judge court, entered judgment. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the District of Maryland on August 18, 1975. App., infra, pp. 51a-52a. Time for docketing the appeal was extended by order of Mr. Chief Justice Burger to November 24, 1975.

The jurisdiction of the Supreme Court to review this decision of the United States District Court on appeal is conferred by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

Statute Involved

42 U.S.C. §405(g) is set out in the Appendix, infra, pp. 53a-54a.

Question Presented

Whether 42 U.S.C. §405(g) prohibits

the federal courts from enjoining the operation of a provision of the Social Security Act held to be unconstitutional.

Statement of the Case

Appellant Jacob C. Jablon, prior to his retirement, was engaged in employment not covered by Social Security. By 1973 he was sixty-five years old and was retired.

His wife, Bette P. Jablon, was engaged in employment covered by Social Security; when she retired in 1973 at the age of sixty-two, she became entitled to old-age insurance benefits. She began receiving benefits in July, 1973. She continues to receive these benefits.

At the time of his wife's retirement, Mr. Jablon was not receiving at least one-half of his support from her.

On June 8, 1973, Mr. Jablon applied for Social Security insurance benefits under 42 U.S.C. §402(b) as the spouse of an insured individual. He qualified for the benefits in all respects except that the benefits authorized by that subsection are available only to wives, not husbands. Mr. Jablon would have been entitled to benefits under 42 U.S.C. §402(c) (the provision applicable to husbands of insured individuals) except that he was not dependent on his wife for at least one-half of his support. This disqualified him under §402(c)(1)(C).

On July 12, 1974 appellants filed a complaint in the United States District

Court for the District of Maryland asserting that 42 U.S.C. §402, insofar as it requires different treatment for the spouses of male and female wage-earners insured under Social Security, establishes an arbitrary classification in violation of the due process clause of the Fifth Amendment to the United States Constitution.

On July 28, 1975 the District Court entered judgment for appellant Jacob C. Jablon, but determined not to grant an injunction. In refusing to order the injunction "unequivocally" requested by the appellants, the District Court relied exclusively on the "views expressed by Mr. Justice Rehnquist" in Weinberger v. Salfi, 95 S. Ct. 2457, 2466 n. 8 (1975). Appellants Jablon appeal from this judgment to the extent that it denies injunctive relief.

The Question is Substantial

Based upon a footnote in Weinberger v. Salfi, 95 S. Ct. 2457, 2466 n. 8 (1975), the court below concluded that a Social Security Act provision, held unconstitutional, is nonetheless impervious to an injunction against its continued enforcement. This conclusion draws no support from express legislative policy, cannot be reconciled with well-established precedent, and is wholly at odds with sound administration of justice in the federal courts.

I.

42 U.S.C. §405(g) provides in relevant part:

> **The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .**

The formula is familiar. It is a textbook example of language used to describe the authority of an appellate tribunal to review decisions made in a forum of first instance.[1] The formula reflects the run of the mine Social Security case in which the district court performs, essentially, an appellate function.[2] In context, the §405(g)

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1 See, e.g., Cound, Friendenthal & Miller, Civil Procedure 17 (1974) ("The appellate court has the power to affirm, reverse or modify the judgment of the trial court.") (emphasis in original).

2 For example, the claimant asserts entitlement to disability benefits. He or she applies for benefits and a hearing examiner determines, as a matter of fact, that the claimant is not disabled. This determination is confirmed by the Secretary and the court reviews the case to determine whether the findings are supported by substantial evidence. Powell v. Richardson, 355 F. Supp. 359 (E.D. Pa. 1973) (disability fact finding).

language is descriptive, not ascriptive. Surely if Congress had intended §405(g) to preclude injunctive relief where the issue is the constitutionality of a provision of the Social Security Act, an issue the Secretary lacks authority to adjudicate, see Salfi, supra at 2466, express words would have been directed to that extraordinary end. Indeed, until Salfi, it apparently had not occurred to any court that §405(g), sub silentio, disabled the federal judiciary from fashioning a complete remedy for a constitutional violation. Whether §405(g) is appropriately read to mandate a severe and unprecedented limitation on the remedial authority of the federal judiciary is an issue which merits this Court's full and direct attention.

II.

The Salfi footnote was the sole support tendered for the denial of injunctive relief below. However, that footnote merely states "there is some question" whether §405(g) accommodates authority to enjoin the operation of a Social Security Act provision. The question had not been raised or briefed by the parties, 95 S. Ct. at 2477 (Brennan, J. dissenting), and the Court did not find it necessary, in the context of Salfi, to resolve the issue. This very issue, however, was implicitly decided by the Court some weeks before Salfi, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

In Wiesenfeld, the lower court declared unconstitutional and enjoined the enforcement of a Social Security Act provision establishing a gender-based classification.

The judgment below in Wiesenfeld, unanimously affirmed by this Court, declares:

> **1. That 42 U.S.C. Section 402(g) is unconstitutional insofar as it discriminates against widowers on the basis of sex.**
>
> **2. That the defendant Secretary of Health, Education and Welfare be and hereby is enjoined from denying benefits under Section 402(g) to widowers solely on the basis of sex.**
>
> . . . .

If the Wiesenfeld lower court lacked authority "to enter an injunctive decree whose operation reache[d] beyond [Stephen Wiesenfeld]," see Salfi, supra, at 2466 n. 8, surely this Court would not have affirmed the Wiesenfeld judgment without modification. For as Mr. Justice Rehnquist has explained, the source of federal jurisdiction in Wiesenfeld was §405(g). See Salfi, supra, at 2468 n. 10.

III.

Judicial implication of a limitation on federal court authority to enjoin unlawful administrative action when Congress did not expressly preclude injunctive relief is contrary to well-established precedent. In an unbroken line of decision this Court has affirmed "the inherent equitable powers" of federal courts to afford complete, not truncated justice.

For example, in Porter v. Warner Holding

Co., 328 U.S. 395 (1946), a case arising under the Emergency Price Control Act of 1942, the Court reasoned:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." . . . It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest . . . . In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Id. at 398. See also American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960).

The "no injunction" argument pressed by the Secretary in the court below resembles the position taken by another federal

agency in Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 5 (1942), where this Court noted:

> Even though the Court "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders" in cases where such orders were found to be necessary, the Commission opposed the issuance of a stay order in this case on the ground that the Court was without power to grant a stay.

Similarly, in the instant case the Secretary challenges remedial authority he accepted until now without objection before this Court. See, e.g., Weinberger v. Wiesenfeld, supra; Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972). He should fare no better than the F.C.C. did in Scripps-Howard.

This Court's guidance in a series of fully reasoned opinions, not a footnote query,[3] should have informed the decision below. As the Court explained in Porter, supra:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute

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[3] Cf. Communication Workers of America v. American Telephone and Telegraph Co., 513 F.2d 1024, 1028 (2d Cir. 1975).

> in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 497, 503 . . . .

328 U.S. at 398. Plainly, there is no "inescapable inference" in the words of §405(g), much less a "clear and valid legislative command," precluding equitable relief. It is neither necessary nor reasonable to read §405(g) as a limitation on remedial authority. Rather, it is both reasonable and appropriate to conclude that §405(g) power to reverse includes authority to do so by injunction.

This case arises not only under Title II of the Social Security Act "which provides both the standing and the substantive basis for the presentation of . . . constitutional contentions." Salfi, supra, 95 S. Ct. at 2464. It also arises under the Constitution of the United States. The Court in Salfi said:

> It would of course be fruitless to contend that appellees' claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint.

Ibid.

In the absence of express statutory limitation on remedial power, principles developed in other constitutional cases are directly applicable here. Appellants have not discovered a single instance in which an unconstitutional statute was found to be immune from an injunction against its continued enforcement. Decades ago, in Bell v. Hood, 327 U.S. 678, 684 (1946), this Court said:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . . [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

More recently, the Court underscored the same point in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 396 (1971), a decision acknowledging that in a case arising under the Constitution, broad remedial powers reside in the federal judiciary to grant all appropriate relief, both legal and equitable. Also instructive is the Second Circuit's discussion in Bivens of the reach of a federal district court's "inherent equitable powers":

> It is now clear that there is an implied injunctive remedy for threatened or continuing constitutional violations. See Bell v. Hood, 327 U.S. 678, 684 & n. 4, . . . (1946); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 696-7, . . . (1949); Ex Parte Young, 209 U.S. 123, . . . (1908); United States v. Lee, 106 U.S. 196, . . . (1882) . . . . [I]njunctive relief . . . seems to be an essential corollary to the power of judicial review established by Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803). The power to declare an action of the legislative or executive branch unconstitutional is an empty one if the judiciary lacks a remedy to stop or prevent the action. 409 F.2d 718, 723 (2d Cir. 1969) (emphasis supplied).

In sum, the ruling below that equitable relief is incompatible with §405(g) jurisdiction to reverse the Secretary's decision cannot survive careful inspection in the light of reasoned authority.

IV.

Unless the Secretary is prohibited from utilizing the classification held unconstitutional, injustice may be perpetuated and judicial business multiplied. In Flemming v. Nestor, 363 U.S. 603, 607 (1960), this Court concisely described the effect of a decree that provides relief for

the individual Social Security claimant, but does not run to the benefit of others similarly situated. Such a decree

> would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of stare decisis, it would have no other result than to require the payment of appell[ant's] benefits.

Appellants rightfully seek more: for themselves, the security an injunction affords for the Secretary's continued compliance, cf. Aberdeen & Rockfish R.R. v. S.C.R.A.P., 95 S. Ct. 2336, 2350 n. 11 (1975); and in the public interest, relief requiring the Secretary to treat even-handedly all claimants in appellants' class. Cf. Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973).

Absent prohibitory relief in this case, the Secretary could limit application of the constitutional principles announced by the court to the benefit currently due Jacob Jablon. As to all others, the Secretary would remain free to pursue an unconstitutional course.

To obtain the benefit of the constitutional adjudication made in the instant case, others in appellants' position would have to engage legal counsel to pursue litigation for the sole purpose of pleading stare decisis. Potential plaintiffs with constitutional claims identical to

appellants' number in the thousands.[4] Nor would the effect of sustaining the "no injunction" ruling below end with those thousands. It would extend to every other constitutional adjudication regarding a Social Security Act provision and presumably well beyond the Act, to diverse other statutes employing the same judicial review formula.

Thus a decree that does not reach beyond appellants might confront district courts with a plethora of new cases, every one of which would have a preordained outcome. Such a parade of cases in search of stare decisis adjudication would be an incongruous sight in a federal judiciary already congested by a large, ever-increasing caseload.

The result below, permitting an executive officer to persist in enforcing a statute declared unconstitutional by the judiciary, generates a further anomaly. The Constitution would be the law for those with the resources or sophistication to obtain counsel willing to pursue their claims through federal court adjudication. An unconstitutional statute would govern those less fortunately situated. Such a

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[4] See Brief for the Appellant, Weinberger v. Wiesenfeld, supra, at 22. Had this Court instructed modification of the Wiesenfeld judgment to run to the benefit of Stephen Wiesenfeld only, hundreds of widowed-fathers would have had to run the gauntlet of administrative and judicial proceedings to obtain benefits this Court declared due them under the Constitution.

state of affairs would be unconscionable.[5]

Conclusion

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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November, 1975

Attorneys for appellants gratefully acknowledge the assistance provided in the preparation of this jurisdictional statement by Mary Elizabeth Freeman, third-year student, Columbia Law School.

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[5] The situation is aggrevated with regard to the benefit involved in the instant case. To receive it, one must be at least 62 years of age and without substantial earnings. Prolonging the process or making it more arduous for persons in appellants' class, all of them senior citizens, and most of them non-affluent, not only delays justice, but may well deny it.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETTE P. JABLON and JACOB C. JABLON, individually and on behalf of all other persons similarly situated,	:	
		CIV. NO.
v.	:	K-74-739
SECRETARY OF HEALTH, EDUCATION AND WELFARE	:	
	:	

ORDER

For the reasons set forth in this Court's opinion of even date herewith, judgment is hereby entered for the plaintiff Jacob C. Jablon upon his claim herein, and judgment is hereby entered for the defendant as to the claim herein of Bette P. Jablon. The defendant shall bear the costs of this proceeding. The Clerk is directed to send copies of that opinion and of this order to counsel of record. It is so ORDERED, this 28th day of July, 1975.

United States Circuit Judge
/s/ Harrison L. Winter

United States District Judge
/s/ Frank A. Kaufman

United States District Judge
/s/ C. Stanley Blair

OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETTE P. JABLON and JACOB C.JABLON, individually and on behalf of all other persons similarly situated	:	
v.	:	CIV.NO. K-74-739
SECRETARY OF HEALTH, EDUCATION AND WELFARE	:	

Filed: July 18, 1975

Arnold Jablon and Jablon and Jablon, of Baltimore, Maryland; and Kathleen Willert Peratis, of the American Civil Liberties Union Foundation, New York, New York, for Plaintiffs.

Jervis S. Finney, United States Attorney, and John W. Sheldon, Assistant United States Attorney, Baltimore, Maryland; and William Z. Elliott, Attorney, Office of the General Counsel, Social Security Division, Department of Health, Education and Welfare, Baltimore, Maryland, for Defendant.

Before Winter, Circuit Judge, and Kaufman and Blair, District Judges. Kaufman, District Judge.

Plaintiffs Jacob and Bette Jablon, husband and wife, have instituted the within proceeding challenging the provisions of 42 U.S.C. §402(c)(1)(C)[1] as repugnant to the Due Process Clause of the Fifth Amendment to the federal Constitution.[2]

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1 The text of that statute is reproduced infra at n.7 of this opinion.

2 The Fifth Amendment imposes upon the federal Government the same equal protection obligations as are imposed upon the states by the Fourteenth Amendment. See Weinberger v. Wiesenfeld, 43 L.Ed.2d 514, 519 n.2 (1975).

Plaintiffs seek injunctive and declaratory relief against the continued application of 42 U.S.C. § 402(c)(1)(C) in such a manner as to deny Jacob Jablon a husband's insurance benefits, and also seek by way of damages such benefits, apparently dating from July 1973, which Jacob would have received but for the operation of that section. Plaintiffs do not seek any retroactive benefits or damages on behalf of anyone other than the named plaintiffs, but do seek, on behalf of the named plaintiffs and the members of a proposed Federal Civil Rule 23(b)(2) class, injunctive and declaratory relief.[3]

Defendant has moved to dismiss, or in the alternative for summary judgment, based upon

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[3] Plaintiffs initially claimed attorneys' fees but have not since, in written or oral argument, alluded thereto. Accordingly, this Court treats that claim as abandoned. As to attorneys' fees generally, see Alyeska Pipeline Service Co. v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975).

the administrative record herein. Plaintiffs have filed a cross-motion for summary judgment. There are seemingly no controverted facts herein, but rather only legal issues which are appropriately ripe for determination within the above-described summary judgment context.[4]

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[4] After this case was originally argued and submitted on February 14, 1975, this Court advised counsel that it would await the filing by the Supreme Court of its opinion in Weinberger v. Wiesenfeld, 43 L.Ed.2d 514(1975). After that opinion was handed down on March 19, 1975, counsel herein, in response to this Court's invitation, filed further legal memoranda. Thereafter, in the wake of Weinberger v. Salfi, 43 U.S.L.W. 4985 (U.S. June 26, 1975), counsel were offered the opportunity to be heard on the issues of jurisdiction, class action and three-judge Court. However, counsel were able, as noted in the body of this opinion infra, to resolve the first two issues by stipulation; as to the third issue, additional comments with regard to whether this three-judge Court should dissolve itself have been submitted.

JURISDICTION

Jurisdiction was initially asserted pursuant to 28 U.S.C.§1331. However, the clear holding by the Supreme Court in Weinberger v. Salfi, 43 U.S.L.W. 4985 (U.S. June 26, 1975), that 42 U.S.C.§405(h) bars 1331 jurisdiction, negates plaintiffs' 1331 jurisdictional claim. However, Salfi teaches, and the Government has formally conceded in the light of Salfi, that jurisdiction is present in a case like this pursuant to 42 U.S.C.§405(g) provided there has been an exhaustion of administrative remedies by a plaintiff and a final decision by the Secretary upon that plaintiff's claim. Accordingly, since Jacob Jablon has concededly exhausted his administrative remedies and the Secretary has made a final adverse decision as to his claim, jurisdiction is present as to Jacob Jablon's claim. Weinberger v. Salfi, supra at 4990; Weinberger v. Wiesenfeld, 43 L.Ed. 2d 514 (1975), in which, as Mr. Justice Rehnquist wrote in Salfi, supra at 4990 n.10, section 405(g) jurisdiction was similarly present, noting:

> *** In that case the Secretary stipulated that exhaustion would have been futile, and he did not make any contentions that Wiesenfeld had not complied with the requirements of §405(g). * * *

Whether jurisdiction is present in this case as to Bette Jablon's claims under 1331 or 405(g) or otherwise presents a question which need not be explored herein in view of this Court's conclusion, stated infra at p.13 of this opinion that there exists no need herein to reach Bette's claims upon the merits.

THREE-JUDGE COURT

The Government initially opposed formation of the within three-judge Court pursuant to 28 U.S.C.§§2282, 2284 on the basis that no "substantial" federal question, as that term has been defined by such cases as Goosby v. Osser, 409 U.S. 512, 518-19 (1973), has been presented. The Supreme Court's recent opinion in Weinberger v. Wiesenfeld, supra, and this Court's within disposition of the merits of the substantive issue raised herein, require a clear, negative answer to that particular argument. However, the Government has also opposed formation of a three-judge Court on the ground that injunctive relief cannot properly issue inasmuch as plaintiffs' quests for relief are in essence only for damage and declaratory relief, and thus that the within action is not one to restrain the operation of a federal statute as is required by 28 U.S.C. §2282. See Flemming v. Nestor, 363 U.S. 603, 606-07 (1960). While

the Jablons have unequivocally stated a request for injunctive relief against further enforcement of the provisions of section 402(c)(1)(C), that government position may nevertheless well [sic] be corrected in the light of Mr. Justice Rehnquist's comments in Salfi, supra, at 4989 n.8, that the judicial review provisions of the Social Security Act which alone conferred federal jurisdiction in that case do not contain any

> * * * suggestion that reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court. In view of our dispositions of the class action and constitutional issues in this case, the only significance of this problem goes to our own jurisdiction. If a §405(g) court is not empowered to enjoin the operation of a federal statute, then a three-judge District Court was not required to hear this case, 28 U.S.C.§2282, and we are without jurisdiction under 28 U.S.C. §1253. However, whether or not the three-judge court was properly convened, that court did hold a federal statute unconstitutional in a civil action to which a federal agency and officers are parties. We thus have direct appellate jurisdiction under 28 U.S.C. §1252.

McLucas v. DeChamplain, slip op., at 8-9 (No. 73-1346, Apr. 15, 1975).

Herein, the only relief granted runs in favor of Jacob Jablon and is stated, in accordance with the above-quoted views expressed by Mr. Justice Rehnquist, solely in terms of a reversal of the Secretary's adverse final decision as to Jacob's claim and a remand to him directing him to grant Jacob Jablon's claim. Thus, since this Court has determined not to grant any injunctive relief herein, it could seemingly dissolve itself and permit this case to go forward as a single judge case. However, since all three judges of this Court have devoted a great deal of time to this case and are in complete accord as to its disposition--since, if this three-judge Court were dissolved, the writer of this opinion, as the judge to whom this case was originally assigned and who called for the convening of the three-judge Court, would be the single District Court judge handling this case and would file an opinion identical in all respects with this opinion--and since in any event the holding herein on the merits of constitutional invalidity of a federal statute will seemingly confer direct appellate jurisdiction upon the Supreme Court regardless of whether this case is determined in this District Court by a single judge or by a statutory three-judge Court, this three-judge Court has determined not to dissolve itself.

FACTS

The facts, stipulated by the parties, disclose that the named plaintiffs, Jacob C. Jablon and Better P. Jablon, are legally married; that Jacob Jablon was born on December 8, 1908; and that Bette Jablon was born on August 9, 1910. Bette Jablon filed an application for retirement insurance benefits on June 8, 1973, and became entitled to receive the same beginning with the month of July 1973. Jacob Jablon, not otherwise entitled to receive any old-age or disability insurance benefits, filed an application for husband's insurance benefits pursuant to 42 U.S.C §402(c).[5] Jacob's said application was initially denied on July 5, 1973 and denied

5 Plaintiffs have alleged that Bette Jablon "has worked for many years as a bookkeeper, an office manager, and a library aide" and that "[s]he is an insured individual under the Social Security Act"; and also that Jacob Jablon was employed by the federal Government and was not an insured individual under the Social Security Act. Those alleged facts are seemingly not disputed herein.

upon reconsideration on August 16, 1973, for the reason that Jacob did not receive at least one-half of his support from his wife. Jacob at first requested an administrative hearing, but then waived a formal hearing because he had no additional evidence to present. The administrative law judge held that Jacob was not entitled to "husband's insurance benefits" because Jacob did not receive at least one-half of his support from his wife in accordance with 42 U.S.C. §402(c)(1)(C) and regulations promulgated pursuant thereto.[6] Thereafter, noting Jacob's admission that he was not receiving at least one-half of his support from Bette, the Appeals Council of the Social Security Administration affirmed the administrative law judge's decision and adopted it as the final decision of the Secretary of HEW. The parties have expressly stipulated that:

> Jacob C. Jablon has exhausted the administrative remedies available to him. The decision of the Secretary is supported by substantial evidence and, therefore, the constitutional claim for benefits is now ripe for judicial review.

6 See 5 C.F.R. §404.350 (1974).

SUBSTANTIVE MERITS

Pursuant to the provisions of 42 U.S.C. §§402(b)-(c),[7] both male and female spouses of individuals seeking old-age or disability

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[7] Those statutes provide, in pertinent part:

Wife's insurance benefits

(b)(1) The wife (as defined in section 416(b) of this title) and every divorced wife (as defined in section 416(d) of this title) of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife--

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,

insurance benefits under Social Security law may, under certain enumerated circumstances, be entitled to receive benefits payable to

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(Footnote [7] continued from page 12)

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual, shall (subject to subsection (s) of this section) be entitled to a wife's insurance benefit * * *.

Husband's insurance benefits

(c)(1) The husband (as defined in section 416(f) of this title) of an individual entitled to old-age or disability insurance benefits, if such husband--

them related to their spouses' past earnings. Those benefits are sometimes hereinafter referred to as "spousal benefits".

(Footnote 7 continued from page 13)

(A) has filed application for husband's insurance benefits,

(B) has attained age 62,

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual--

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits, and filed proof of such support within two years after the month in which she filed application with respect to

While in most respects male and female spouses are made elegible for such spousal benefits on identical terms, a male spouse must, in accordance with the terms of section 402(c)(1)(C), demonstrate that he "was receiving at least one-half of his support" from his wage earning wife at the time his wife became eligible for old-age or disability insurance benefits,[8]

(Footnote 7 continued from page 14)

such period of disability or after the month in which she became entitled to such benefits, as the case may be, or, if she did not have such a period, two years after the month in which she became entitled to such benefits, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of his wife, shall be entitled to a husband's insurance benefit * * * [Emphasis supplied.]

8 Except under circumstances described in 42 U.S.C. §402(c)(1)(C)(i). See n.7 supra.

while a female spouse need in no case prove such dependency on her part. Accordingly, a 62 year old female who is not covered by Social Security or who, if she is so covered, receives an insurance benefit based upon a primary insurance amount less than half of that upon which her male spouse is entitled to receive benefits[9] may nevertheless receive a spousal benefit regardless of any other income sources she might have, even if the same would render her entirely nondependent upon her spouse. A 62 year old male who is not covered by Social Security or who is entitled to insurance benefits based upon a primary insurance amount less than one-half that upon which his female spouse is entitled to receive benefits[10] may under no circumstances receive such a spousal benefit as long as he provides more than one-half of his own support. Plaintiffs argue that section 402(c)(1)(C) effects a "double-edged" sex discrimination in violation of

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9 See 42 U.S.C. §402(b)(1)(D).

10 See 42 U.S.C. §402 (c)(1)(D).

constitutional equal protection norms in that that [sic] section (1) discriminates against a female wage earner because it makes her Social Security contributions worth less to her husband and to her "family unit" than the contributions of a similarly situated male, and that it (2) discriminates against a nondependent male because it grants to him less benefits than to a similarly situated female. Bette Jablon claims under (1). Jacob Jablon claims under (2).

CLASS ACTION ASPECTS

Plaintiffs originally sought to represent a class composed of "all past, present and future husbands of old age benefits recipients whose husbands are entitled to Social Security benefits" but for the dependency requirements of 42 U.S.C. §402(c)(1)(C), and of "all past, present and future recipients of old age benefits under the Social Security Act whose husbands are entitled to benefits under 42 U.S.C. §402(c)" but for the dependency requirements of section 402(c)(1)(C). In essence therefore the Jablons originally sought a class composed of two sub-parts, a husband sub-class and a wife sub-class.

However, after the Supreme Court filed its opinion in Salfi, the Jablons withdrew their class action requests. In Salfi, the Supreme Court held that the jurisdiction of a federal District Court to review under 42 U.S.C. §405(g) and (h) a final decision of the Secretary adverse to a named claimant's claim extends only to those-claimants and "not as to the unnamed members of the class." Salfi, supra at 4989 (footnote omitted). Thus, Jacob Jablon's class quest must fail. If Bette Jablon is without standing to maintain this suit, Bette could not represent the proposed class. See, e.g., Kaufman v. Dreyfus Fund, Inc., 434 F.2d 727, 734 (3d Cir. 1970). Once again, this Court's conclusion that there is no need, in view of this Court's determination as to Jacob's claims, to reach the merits of the constitutional claims Bette poses herein, eliminates the need further to consider Bette's individual and class action contentions.[10A]

STANDING ISSUES

Several threshold issues of standing have been raised. Defendant, characterizing Bette Jablon's complaint as a "generalized grievance, shared with all taxpayers, concerning the distribution of

[10A] See the discussion infra at pp. 12-13 of this opinion.

tax money", vigorously challenges Bette's standing to attack the absence of payments made to her husband. Defendant has, moreover, seemingly challenged the standing of Jacob Jablon to assert the unconstitutionality of section 402(c)(1)(C) on the grounds that Jacob is seeking to raise the alleged constitutional rights of his wife and that Jacob himself has not suffered a sufficient injury of his own to confer upon him such standing. That latter position on the part of defendant is without merit. The pecuniary disadvantage to which Jacob Jablon has been subjected by section 402 (c)(1)(C) is sufficiently significant to give Jacob the requisite "'personal stake in the outcome of the [within] controversy'" which has been required by such cases as Sierra Club v. Morton, 405 U.S. 727, 732 (1972), quoting from Baker v. Carr, 369 U.S. 186, 204 (1962). Moreover, such injury stems directly from, and is inextricably intertwined with, the operation of section 402 (c)(1)(C), and thus confers upon Jacob's standing to challenge the particular provisions of that statute. See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973). Additionally, Mr. Justice Brennan's

analysis[11] in Weinberger v. Wiesenfeld, supra. would seemingly indicate that Jacob has standing, in the process of challenging the rationality of the sex-based classification in question, to point to the inequities which that classification works not only upon himself and similarly situated males, but also upon female wage earners.

In arguing that Bette Jablon lacks standing to maintain this suit, the Government has characterized Bette's within claims as a garden variety "taxpayer's suit". See, e.g., Schlesinger v. Reservists Committee to Stop the War, 41 L.Ed.2d 706 (1974). That characterization is predicated upon the rationale that because Bette has no "right" to any particular application of her Social Security contributions,[12] she has suffered no cognizable "injury" by the denial of spousal benefits to Jacob. Plaintiffs assert that Bette has a "right" to have her Social Security contributions distributed in a manner not based solely on considerations of gender, and further suggest that Bette's "injury"

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11 See the more detailed discussion at p. 21, infra.

12 Cf. the discussion at pp. 18-19 infra.

may be seen in the diminished benefits available to her "family unit".

In view of this Court's conclusion that Jacob has standing and in view of this Court's further conclusion that Jacob's attack upon the constitutionality of section 402(c)(1)(C) is meritorious, this Court need not resolve the standing issue as to Bette or reach the merits of the constitutional attack she mounts herein.[13]

THE GOVERNMENT'S POSITION AND STANDARD OF REVIEW

The Government has at no time during the course of this litigation denied that 42 U.S.C. §§402(b)-(c) discriminates between male and female spouses of covered wage earners on the basis of sex and on that basis alone. The Government has, however, consistently maintained that such discrimination does not violate Fifth Amendment equal protection standards, reasoning that the presumption of dependency embodied in section 402(b) is

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13 The separate challenges of the Jablons are set out at p. 10 supra.

rationally justified. The Government argues, alternatively, that only suspect classifications are impermissible in Social Security legislation because no plaintiff possesses a contractual right to any particular distribution of Social Security benefits; that the congressional intent underlying spousal benefits was to provide aid to "dependent" spouses only, and that the presumption of dependency accorded to a female spouse by section 402(b) is justified by current and historic labor practices and statistics; and that any preference accorded female spouses by the combination of section 402(b) and section 402(c)(1)(C) is constitutionally permissible as remedial legislation aimed at eradicating lingering vestiges of past economic discrimination against women. The Government has additionally taken the position that any sex discrimination inherent in section 402(c)(1)(C) is justified by the severe strain which would be placed upon the Social Security system by any broadening of the class of statutory beneficiaries currently enumerated in sections 402(b)-(c).

Much ink has been spilled in this case upon the question of what standard of review ought properly be applied in examining the

sex-based classification given effect by section 402(c)(1)(C). The Government supports the challenged classification as "'rationally based and free from invidious discrimination.'" Richardson v. Belcher, 404 U.S. 78, 81 (1971), quoting from Dandridge v. Williams, 397 U.S. 471, 487 (1970). Plaintiffs, on the other hand, point to the following standard set forth in Reed v. Reed, 404 U.S. 71, 76 (1971):

> * * * A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). * * * [Emphasis added.]

In describing the import of the equal protection test set forth in Reed, Judge Winter, in Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973), wrote:

> Thus Reed, in a case of invidious sex discrimination, prescribed as a test of validity the presence of

a "fair and substantial" relation between the basis of the classification and the object of the classification. A classification based upon sex is less than suspect; a validating relationship must be more than minimal. What emerges is an "intermediate approach" between rational basis and compelling interest as a test of validity under the equal protection clause. Green v. Waterford Board of Education, 473 F.2d 629 (2 Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1 Cir. 1972); Gunther, The Supreme Court, 1971 Term. Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17 (1972). [Footnotes omitted.]

In the light of Mr. Justice Brennan's recent majority opinion in Weinberger v. Wiesenfeld, supra, a sex-based classification in the Social Security legislation must, at a minimum, be scrutinized under Reed standards. In that context, for reasons developed infra, the within classification cannot survive. Accordingly, it is not appropriate for this Court to determine whether

sex-based classifications must additionally be able to withstand the strict judicial scrutiny traditionally applied to racial- and religious-based classifications, and thus be sustainable only if the Government can demonstrate that such classifications are required by compelling governmental interests which are not otherwise achieved.[14] That question is one which the Supreme Court has again recently found it unnecessary to decide. See Stanton v. Stanton, 43 L.Ed.2d 688, 694 (1975).

WEINBERGER V. WIESENFELD

Mr. Justice Brennan's reasoning in Weinberger v. Wiesenfeld, supra, would seem to compel the conclusion that the within classification is not rationally related to a legitimate governmental

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14 See Geduldig v. Aiello, 417 U.S. 484, 503 (1974) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. 351, 358-59 (1974) (Brennan, J., dissenting); Frontiero v. Richardson, 411 U.S. 677, 682,688 (1973) (Brennan, J.) (plurality opinion).

interest. In Goldfarb v. Secretary, 44 U.S.L.W. 2006, Memorandum and Order, No. 74-C-1188 (E.D.N.Y. June 17, 1975) (three-judge Court); Silbowitz v. Secretary, 44 U.S.L.W. 2030 (S.D. Fla. June 19, 1975); and Coffin v. Secretary, Civil No. 1890-73 (D.D.C. July 14, 1975) (three-judge Court), in each of which cases seemingly the identical issue posed herein was posed therein, section 402(c)(1)(C) was held unconstitutional on equal protection grounds upon the authority of Wiesenfeld.[15] In Wiesenfeld, the challenge was to the constitutionality of 42 U.S.C. §402(g). Pursuant to that statute, the widow of a fully insured wage earner was made eligible for a "child's insurance benefit" in accordance with the terms of 42 U.S.C. §402(d). No statutory provision was made for a similar benefit for a widower of a fully insured female wage earner when such a child was in his care. In affirming the decision of a

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15 In a separate opinion in Goldfarb, Judge Moore reluctantly concurred in the light of the Supreme Court's opinion in Wiesenfeld but set forth his concern in connection with the cost factors discussed infra.

three-judge Court holding such differential statutory treatment unconstitutional, Mr. Justice Brennan wrote (43 L.Ed2d, supra at 521-22):

> The gender-based distinction made by §402(g) is indistinguishable from that invalidated in Frontiero v. Richardson, 411 U.S. 677 (1973). Frontiero involved statutes which provided the wife of a male serviceman with dependents' benefits but not the husband of a servicewoman unless she proved that she supplied more than one-half of her husband's support. The Court held that the statutory scheme violated the right to equal protection secured by the Fifth Amendment. Schlesinger v. Ballard, ___ U.S. ___ (1975), explained: "In . . . Frontiero the challenged [classification] based on sex [was] premised on overbroad generalizations that could not be tolerated under the Constitution . . . . [T]he assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not." __U.S., at __.

A virtually identical "archaic and overbroad" generalization, id., at ___, "not . . . tolerated under the Constitution" underlies the distinction drawn by §402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support.[11]

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11. See the observations in Frontiero, 411 U.S., at 689, n.23, that in view of the large percentage of married women working (41.5% in 1971), the presumption of complete dependency of wives upon husbands has little relationship to present reality. In the same vein, Taylor v. Louisiana, ___U.S.___ (1975), observed that current statistics bely "the presumed role in the home" of contemporary women. ___U.S., at ___, n. 17.

In support of the sex-based discrimination effected by 42 U.S.C. §402(g), the Government contended, as it contends herein, that Congress is not constitutionally required to provide similarly situated male and female individuals with the same benefits. In response to that argument, Mr. Justice Brennan wrote (at 523-24):

> Appellant relies for the first proposition primarily on Flemming v. Nestor, 363 U.S. 603 (1960). We held in Flemming that the interest of a covered employee in future social security benefits is "noncontractual," because "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent upon the degree to which he was called upon to support the system by taxation." 363 U.S., at 609-610. The Government apparently contends that since benefits derived from the social security program do not correlate necessarily with contributions made to the program, a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment.

We do not see how the fact that social security benefits are "noncontractual" can sanction differential protection for covered employees which is solely gender-based. From the outset, social security old age, disability, and survivors' (OASDI) benefits have been "afforded as a matter of right, related to past participation in the productive processes of the country." Final Report of the Advisory Council on Social Security 17 (1938). It is true that social security benefits are not necessarily related directly to tax contributions, since the OASDI system is structured to provide benefits in part according to presumed need. For this reason, Flemming held that the position of a covered employee "cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on contractual payments." 363 U.S., at 610. But the fact remains that the statutory right to benefits is directly related to years worked and amount earned by a covered employee, and not to the need of of the beneficiaries directly. Since OASDI benefits do depend

> significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex. [Footnotes omitted.]

Similarly, the Government's contention that the non-contractual nature of the Social Security benefits involved in this case distinguishes them from such compensation as the wage-related benefits in Frontiero or pursuant to a private or governmental pension plan does not justify the sex-based discrimination complained of herein.

As previously noted, the Government has herein contended that sections 402 (b) and (c) were enacted to afford additional protection to beneficiaries in accord with their probable need, and that empirical data justifies a presumption of need as to women but not to males, and thus legitimates the sex-based discrimination inherent in section 402(c)(1)(C).

Mr. Justice Brennan appears adequately to have answered that contention when, in response to a similar government contention in Wiesenfeld, he wrote (at 522-23):

> Section 402(g) was added to the Social Security Act in 1939 as one of a large number of amendments designed to "afford more adequate protection to the family as a unit." H.R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). Monthly benefits were provided to wives, children, widows, orphans, and surviving dependent parents of covered workers. Ibid. However, children of covered women workers were eligible for survivors' benefits only in limited circumstances, see n.5, supra, and no benefits whatever were made available to husbands or widowers on the basis of their wives' covered employment.
>
> Underlying the 1939 scheme was the principle that "under a social-insurance plan, the primary purpose is to pay benefits in accordance with the probable needs of beneficiaries rather than to make payments to the estate of a deceased person regardless of whether

> or not he leaves dependents." H.R. Rep. No. 728, supra, at 7. (Emphasis supplied.) It was felt that "[t]he payment of these survivorship benefits and supplements for the wife of an annuitant are . . . in keeping with the principle of social insurance . . . ." Ibid. Thus, the framers of the Act legislated on the "then generally accepted presumption that a man is responsible for the support of his wife and child." Hoskins & Dixby, Women and Social Security--Law and Policy in Five Countries, Social Security Administration Research Report No. 42, 77 (1973).
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> Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. See Kahn v. Shevin, 416 U.S. 351, 354 n.7 (1974). But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support. [Footnotes omitted.]

The Government has sought to distinguish Wiesenfeld from the within case on the basis that the presumption that a male was not dependent was irrebuttable in that case, whereas it is open to Jacob Jablon to demonstrate that he is in fact dependent upon his wife for "at least one-half of his support".[16] That purported distinction is, for purposes of this litigation, a distinction without a difference. In Wiesenfeld, Mr. Justice Brennan specifically stated (at 523):

> Section 402(g) clearly operates, as did the statutes invalidated by our judgment in Frontiero, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious. First, it was open to the servicewoman under the statutes invalidated in Frontiero to prove that her husband was in fact dependent upon her. Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for his support, or that, had his wife lived, she would have remained at work while he took over care of the child. Second, in this case social security taxes were deducted from Paula's salary during the years in which she

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16 See 42 U.S.C. §402(c)(1)(C)

> worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in Frontiero, the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

Assuming arguendo that the dependency provisions of section 402(c)(1)(C) are less "pernicious" than the irrebuttable presumption of nondependence invalidated in Wiesenfeld, it would appear that the validity of those provisions contained in section 402(c)(1)(C) was at the least thrown strongly into doubt by the Court's earlier opinion in Frontiero v. Richardson, 411 U.S. 677, 688-89 (1973), relied upon in Wiesenfeld, and may not survive under the rationale of Wiesenfeld itself.

The Government has contended in this case that section 402(c)(1)(C) was enacted as remedial legislation aimed at compensating women for past discriminations suffered by women in the economic marketplace, and has directed this Court's attention to several cases which have sustained similarly-motived legislation as constitutional.[17] Plaintiffs, on the other hand, argue that section 402(c)(1)(C) was enacted upon the basis of the stereotypic, male chauvinistic notion that the normal role of a male was that of breadwinner, while that of a woman was that of stay-at-home dependent. In Wiesenfeld, supra, Mr. Justice Brennan stated (at 524-25):

> The Government seeks to characterize the classification here as

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17 See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (Florida property tax exemption extended to widows but not widowers); Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), cert. denied sub nom. Gruenwald v. Cohen, 393 U.S. 982 (1968) (women accorded more favorable treatment than men in computation of social security benefits); Kohr v. Weinberger, 378 F. Supp. 1299 (E.D. Pa. 1974) (three-judge Court) (same type of contention as presented in Gruenwald).

> one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families. The Court held in Kahn v. Shevin, supra, 416 U.S., at 355, that a statute "reasonably designed to further a state policy of cushioning the financial impact of spousal loss upon that sex for which that loss imposes a disproportionately heavy burden" can survive an equal protection attack. See also Schlesinger v. Ballard, supra. But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.[16] * * *

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16 This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See Eisenstadt v. Baird, 405 U.S. 438 (1972); Jiminez v. Weinberger, 417 U.S. 628, 634 (1974); U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 536-37 (1973).

Further, with regard to section 402(c)(1)(C), this Court has not been referred to any legislative history which suggests that that section had the broad remedial purpose the Government seeks to ascribe to it. Not only is such a purpose not self-evident from a reading of the statute's text, but section 402(c)(1)(C) seemingly evinces only a congressional intent of aiding dependent spouses of both sexes. Accordingly, the sex-based classification effected by section 402(c)(1)(C) cannot be justified on a remedial basis.

Moreover, even assuming, arguendo, that section 402(c)(1)(C) was enacted to help upgrade the economic position of women, it does not appear, that that statute is "reasonably designed to further" that purpose. Indeed, the opposite would appear true. Section 402(c)(1)(C) bestows its benefits upon two seemingly narrow classes of women: first those women who, although not covered by Social Security benefits, nonetheless provide more than one-half of their own support; and second, those who, although eligible for Social Security benefits based upon a primary insurance amount less than one-half of that of their husband, provide more than one-half of their own support. On the other hand, the statute has an obvious even if perhaps indirect rather than direct adverse impact

upon the female wage earner whose spouse provides more than one-half of his own support and who is either not covered by Social Security or who receives Social Security benefits based upon a primary amount less than one-half that of his wife. Such a female earner's earnings are, solely on the basis of her sex, made less valuable to her family than the earnings of a similarly situated male.[18]

In sum, the words of Mr. Justice Brennan in Frontiero, supra, at 689 n.22, might well have been used in describing section 402(c)(1)(C):

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18 The discrimination which section 402(c)(1)(C) works against the female breadwinner readily distinguishes this case from Norton v. Weinberger, 390 F. Supp. 1084(D. Md. 1975), appeal pending, in which a divided three-judge panel of this Court upheld, in the face of an equal protection challenge, the provisions of 42 U.S.C. §416(h)(3)(C)(ii), pursuant to which the legitimate children of insured individuals were accorded a statutory presumption of dependency not available to certain classes of illegitimate children. But see Lucas v. Secretary, C.A. No. 4845 (D. R.I. Feb 25, 1975) (Pettine, J.). A copy of the latter opinion has been placed in the official court file in this case.

It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women. See Gruenwald v. Gardner, 390 F.2d 591 (C.A. 2), cert. denied, 393 U.S. 982 (1968); cf. Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968); South Carolina v. Katzenbach, 383 U.S. 301 (1966). On the contrary, these statutes seize upon a group--women--who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages. Cf. Gaston County v. United States, 395 U.S. 285, 296-297 (1969).

The Government has emphasized that the increased costs which will apparently flow from an enlargement of the class of beneficiaries under 42 U.S.C. §402(c)(1)(C) to include persons such as Jacob Jablon,[19] justify any existing discrimination there may be. Cf. Geduldig v. Aiello, 417 U.S. 484, 492-97 (1974). See also Mr. Justice Brennan's dissenting opinion therein at 417 U.S. supra at 503-05. And see further the seeming absence of any reliance, one

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19 See the discussion infra at pp. 28-29.

way or the other, upon increased costs in the majority, concurring and/or dissenting opinions in Wiesenfeld, supra; United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Frontiero v. Richardson, supra; and New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973). That government contention would not appear to be supported by Geduldig v. Aiello, supra. In Geduldig, the Supreme Court held that the decision by California not to include the risk of disability from normal pregnancy within its disability insurance system was not violative of equal protection norms. In so holding, Mr. Justice Stewart stated (at 496):

> The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

> These policies provide an objective and wholly non-invidious base for the State's decision not to create a more comprehensive insurance program than it has. * * * [Emphasis added.]

However, Mr. Justice Stewart also wrote in Geduldig (at 496-97):

> * * * There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. [Footnote 21 omitted.]

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20 The dissenting opinion to the contrary, this case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition--

pregnancy--from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups--pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

While Geduldig suggest that a state's interest in maintaining the self-supporting character of an insurance program may sustain a legislative classification which does not accord different benefits to men and women based on gender alone, that case would not appear to teach that such an interest may sustain a classification which has a disparate effect upon men and women solely because of their sex any more than it could sustain a classification denying benefits solely on the basis of race or religion.

REMEDY

The Social Security Act contains a broad separability clause. 42 U.S.C. §1303 provides:

> If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.

That section would of course tend to divert this Court from choosing the first type of remedy suggested in Welsh v. United States, 398 U.S. 333, 361 (1970), in which Mr. Justice Harlan, concurring, wrote:

> Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. Skinner v. Oklahoma, 316 U.S. 535 (1942); Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931).

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14 See Skinner v. Oklahoma, where Mr. Justice Douglas, in an opinion holding infirm under the Equal Protection Clause a state statute that required sterilization of habitual thieves who perpetrated larcenies but not those who engaged in embezzlement, noted the alternative courses of extending the statute to cover the excluded class or not applying it to the wrongfully included group. The Court declined to speculate which alternative the State would prefer to adopt and simply reversed the judgment.

See also Stanton v. Stanton, 43 L.Ed.2d 688, 697 (1975), leaving the matter "to be resolved by the Utah courts on remand"; Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973), in which the Tenth Circuit extended the coverage of the statute in question.

The relief decreed in Frontiero v. Richardson[20] would also seemingly point this Court toward requiring the abandonment as to Jacob Jablon of any one-half dependency requirement as to males. On the other hand, the affidavit of one Lawrence Alpern, Deputy Chief Actuary for the Office of the Actuary of the Social Security Administration, filed in this case on May 5, 1975, indicates that elimination of the challenged one-half support requirement for Jacob Jablon and all males similarly situated would cost, for the full calendar year 1976, some 411 million dollars. The Government has strongly suggested that such

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20 Mr. Justice Brennan stated (411 U.S. supra at 691 n.25):

> * * * Our conclusion in no wise invalidates the statutory schemes except insofar as they require a female member to prove the dependency of her spouse. * * *

cost would impair the stability of the Social Security fund. It should be noted, however, that during oral argument government counsel stated to this Court that the administrative costs of requiring both male and female spouses to establish actual one-half support dependency could amount to as much as one billion dollars. Accordingly, on balance, it would appear preferable, in the light of this Court's conclusion that 42 U.S.C. §402(c)(1)(C) offends constitutional equal protection norms, that this Court require, as did the Courts which have previously held section 402(c)(1)(C) unconstitutional, see Coffin, supra; Silbowitz, supra, slip op. at 17; Goldfarb, supra, slip op. at 4, that the Social Security Act be interpreted and enforced without reference to the dependency requirement.[21] Accordingly, the

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21 Section 1304 of Title 42 provides:

> The right to alter, amend, or repeal any provision of this chapter is reversed to the Congress.

The Government has called this Court's attention to that statute, and maintained that this Court thereby lacks power to enlarge the class of benefit recipients created by 42 U.S.C. §§402(b)-(c). While

Secretary's denial of Jacob Jablon's claim is hereby reversed and the within case is hereby remanded to the Secretary with the direction to process and grant that claim in the light of this opinion.

United States Circuit Judge
/s/ Harrison L. Winter

United States District Judge
/s/ Frank A. Kaufman

United States District Judge
/s/ C. Stanley Blair

(Footnote 21 continued from page 47)

acknowledging that this Court's proper role is not a legislative one, this Court notes that the Supreme Court's decision in Wiesenfeld, supra, reaffirms the power of a federal Court to remedy an unconstitutional discrimination in federal legislation. See also Frontiero v. Richardson, supra.

Defendant's Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETTE P. JABLON and JACOB C. JABLON, individually and on behalf of all other persons similarly situated	)(	
v.	)(	CIVIL NO. K-74-739
SECRETARY OF HEALTH, EDUCATION and WELFARE	)(	

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §1252, from the judgment of the District Court entered in this action on July 26, 1975.

Dated at Baltimore, Maryland, this 25th day of August, 1975.

CASPAR W. WEINBERGER,
Secretary of Health,
Education and Welfare,

Defendant

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PLAINTIFFS' NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETTE P. JABLON and JACOB C. JABLON, individually and on behalf of all other persons similarly situated	)(	
v.	)(	CIVIL NO. K-74-739
SECRETARY OF HEALTH, EDUCATION and WELFARE	)(	

Notice is hereby given that plaintiffs will appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. §1253, from the judgment entered in this action by the three-judge District Court on July 18, 1975, to the extent such judgment denies an injunction against the enforcement of 42 U.S.C. §402(c)(1)(C).

Dated: New York, N.Y.
August 18, 1975

Respectfully submitted,

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By _____
Kathleen Willert Peratis

STATUTE INVOLVED

Title 42 U.S.C. Section 405(g):

Judicial Review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the Judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary,

because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.